Filed 5/1/12 In re Lillian M. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re LILLIAN M. et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. CODY M., Defendant and Appellant.	F063361 (Super. Ct. Nos. 10CEJ300038-1 & 10CEJ300038-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jane A. Cardoza, Judge.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin B. Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

Cody M. (father) is the father of two children who are dependents of the juvenile court, 11-year-old Lillian and eight-year-old Elijah. Father appeals from the court's summary denial of a Welfare and Institutions Code section 388 petition.[1] He contends that the trial court erred when it failed to treat him as a noncustodial parent during the dependency proceedings under section 361.2. We disagree and will affirm the order.

BACKGROUND

In February of 2010, the local police placed a protective hold on Lillian and Elijah due to allegations that their adoptive mother (mother) was neglecting them. Mother stated that she could no longer control the children due to their sexualized behavior toward each other and their half siblings. Mother wanted them out of the house.

The children had been sexually abused years earlier by their biological mother and placed with father and mother, who adopted the children in 2007. Father was subsequently charged with child abuse when he used excessive discipline on Lillian, which resulted in a black eye. Father then moved out of the house, leaving the children with mother. A restraining order, dated February 11, 2009, and still in place, prevented father from having physical contact with the children.

The Fresno County Department of Social Services (the department) filed a petition in February of 2010, pursuant to section 300, subdivisions (a) and (c), alleging that Lillian and Elijah were at serious risk of harm due to father's excessive discipline of Lillian and mother's neglect of the children. The children were detained from mother. After the children were detained, father told the social worker he wanted to know what he needed to do in order to obtain custody of them.

On February 23, 2010, the juvenile court made a prima facie finding on the department's petition and ordered the children detained in foster care. The department was given discretion to place the children with relatives or a suitable mentor.

---

[1] All further statutory references are to the Welfare and Institutions Code.

In its report prepared in anticipation of the jurisdiction hearing, the department indicated that it had begun arranging services for the family and that the children remained in foster care.

In May of 2010, the matter was submitted to mediation. After some amendments to the language of the petition, mother and father submitted on the matter. Following mediation, the juvenile court made a true finding on the petition, as amended, and asserted jurisdiction over the children.

The report prepared in anticipation of disposition stated that the children had been placed in separate foster homes due to their having displayed sexualized behavior toward each other. Mother waived reunification services, but wanted the children placed with her parents. According to the report, father stated that he did not feel he could adequately protect and parent Lillian, but that he was willing to participate in any recommended services in order to reunify with Elijah. He agreed that Lillian should be placed in a "risk adopt home." The report stated that father intended to waive his right to reunification services with Lillian but had not as yet returned the necessary paperwork.

At the June 22, 2010, disposition hearing, counsel for father indicated that he had reconsidered and decided to pursue services for reunification with Lillian as well. On July 6, 2010, the juvenile court adopted the recommendations of the department and ordered Lillian and Elijah removed from the custody of their parents and ordered that they remain in foster care. Father was to have reasonable supervised visits with the children and the court ordered reunification services for father.

In November of 2010, the family court restraining order against father, in place since 2009, was lifted.

At the time of the January 6, 2011, six-month status review report, father was participating in parenting classes and had completed a mental health assessment, but had not yet completed his domestic violence or batterers treatment services. The department recommended that father receive an additional six months of reunification services and

requested that he undergo another mental health assessment. The children remained in separate placements.

By the time of the six-month status review hearing in March of 2011, the department recommended against moving father to unsupervised visits as he had not yet completed his parenting class and other services. The juvenile court ordered the department to continue providing father with reunification services.

In the 12-month status review report, filed in July of 2011, the department recommended terminating father's reunification services because he continued to minimize his involvement in physically abusing Lillian. Father was not compliant with his services, although he had again enrolled in parenting and batterers program classes. The mental health evaluation found that father was not in need of therapy, but recommended that he participate in a psychological evaluation "14.2.4 risk assessment." Visitation with the children was going well. At the time, Lillian was in a new foster home and doing well. Elijah remained in the same placement where he had been for some time and also was doing well.

On August 29, 2011, father filed a section 388 petition to change the court orders underlying the dependency matter, noting that the basis for the original petition and subsequent actions of the juvenile court was inapplicable as to him. According to father, he was a noncustodial parent at the time the petition was filed and the juvenile court was required to conduct an analysis under section 361.2, subdivision (a), rather than under section 300, subdivision (a). The juvenile court summarily denied father's petition on September 8, 2011, and this appeal followed.

DISCUSSION

Appellant contends the juvenile court prejudicially erred when it failed to consider him a noncustodial parent under section 361.2, subdivision (a). Respondent argues this issue is barred by the doctrine of forfeiture and should not be considered for the first time on appeal. In the alternative, respondent argues that section 361.2 is not applicable to appellant and that, furthermore, even if the juvenile court was required to proceed under

section 361.2, appellant has failed to show prejudice. A question of law, as here, is not automatically subject to the doctrine of forfeiture (*In re V.F.* (2007) 157 Cal.App.4th 962, 968), but we agree with respondent's latter contentions and affirm.

Under the statutory scheme for dependent children, once a section 300 petition is filed, the juvenile court first determines whether the child is a person described by section 300. If the juvenile court finds the child is such a person, it takes jurisdiction over the child. (*Ibid*.) The juvenile court then considers whether the child should be declared a dependent. (§§ 358, subd. (a), 360.) If the child is declared a dependent, the juvenile court considers whether the child will be at substantial risk of harm if left in the custody of the parent. (§ 361.) If there is substantial risk of harm, the juvenile court removes the child from parental custody. (§ 361, subd. (c)(1).)

As directed by section 361.2, subdivision (a), the juvenile court then considers whether the child has a "nonoffending noncustodial" parent who wants "custody." (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1129.) Section 361.2 states in relevant part:

> "(a) When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

"Section 361.2 governs placement when the child has a parent 'with whom the child was not residing at the time that the events or conditions arose that brought the child within the provision of Section 300.' [Citation.] It directs that before the child may be placed in out-of-home care, the juvenile court must first consider placing the child with the noncustodial parent, if that parent requests custody." (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 55, italics and fn. omitted; see also *R.S. v. Superior Court* (2007) 154 Cal.App.4th 1262, 1270 [§ 361.2 applies to noncustodial parent].) "If [the noncustodial] parent requests custody, the court 'shall place' the child with the parent unless 'it finds

that placement with that parent would be detrimental to the minor.' [Citation.]" (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1821.)

We agree with respondent that the juvenile court had no obligation to proceed under section 361.2 because, although appellant was the noncustodial parent at the time of disposition, he did not request placement of the children. We also question his status as a "nonoffending" parent, as his status as the noncustodial parent was the result of a restraining order issued after a finding of abuse on his part and restricted his access to the children. He submitted on this allegation in the current petition.

Even were we to find that the juvenile court should have proceeded under section 361.2, we would find no prejudicial error. A juvenile court's ruling under section 361.2, subdivision (a) that a child should not be placed with a noncustodial, nonoffending parent requires a finding, by clear and convincing evidence, of detriment to the safety, protection, or physical or emotional well-being of the child. Conversely, under section 361, subdivision (c)(1), a dependent child may not be taken from the physical custody of a parent with whom the child resided at the time the petition was initiated, unless the juvenile court finds, by clear and convincing evidence, that there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor and there are no reasonable means by which the minor can be protected without removing the minor from the minor's parent's physical custody.

At the time of disposition, the juvenile court had before it the following facts. Father had submitted on the petition, pursuant to section 300, subdivision (a), that had alleged the children were at a substantial risk of suffering serious physical harm due to his infliction of physical harm to Lillian, resulting in a restraining order against him that only permitted supervised contact with the minors. Father advised the social worker that he did not think he could adequately protect and parent Lillian. Mental health assessments for both Lillian and Elijah described symptoms of disruptive and aggressive behavior, and since father was not making progress in services, his ability to properly parent the children was unknown. Finally, father had not lived with the minors since he

physically abused Lillian and had not yet completed any of the services needed to address the issues.

Regardless of whether the juvenile court used the standard enunciated in section 361.2, subdivision (a), or section 361, subdivision (c)(1), the result for appellant would have been the same.

As previously noted, father appeals from the juvenile court's order summarily denying his section 388 petition, which sought to modify the juvenile court's order removing the minors from his care under section 361. Father acknowledges on appeal that the section 388 petition was "an imperfect mechanism" for the issue at hand, but argues it was "the most logical way of bringing this issue to the juvenile court's attention."

> "Under section 388,[2] a parent may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, and the proposed modification is in the minor's best interests. [Citations.]" (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1119.)

The petition for modification under section 388 must contain a "concise statement of any change of circumstance or new evidence that requires changing the [prior] order." (Cal. Rules of Court, rule 5.570(a)(7).) The parent seeking modification must "make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) "There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new

---

[2]Section 388, subdivision (a) reads, in relevant part: "Any parent or other person having an interest in a child … may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court … for a hearing to change, modify, or set aside any order of court previously made or to terminate jurisdiction of the court. The petition shall be verified and … shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction."

evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Section 388 specifies that the court must order a hearing to be held, "[if] it appears that the best interests of the child may be promoted by the proposed change of order …." (§ 388, subd. (d).) "'The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citations.]'" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

Here, appellant's petition alleged no change of circumstances or new facts, only that section 361.2, not 361, applied, a premise we disagree with as discussed *ante*. In addition, the petition made no allegation that the change would be in the children's best interests except to state that allowing the minors to be placed with him would "allow this family to reunify and offer the children a permanent placement." We find no abuse of discretion in the juvenile court's summary denial of the petition and reject appellant's argument to the contrary. (*In re Brittany K., supra,* 127 Cal.App.4th at p. 1505 [juvenile court's determination to deny § 388 petition without a hearing is reviewed for abuse of discretion].)

DISPOSITION

The order denying father's section 388 petition is affirmed.

_____

DAWSON, J.

WE CONCUR:

_____

CORNELL, Acting P.J.

_____

KANE, J.